



argues it is not responsible for any outstanding medical bills nor future medical treatment. Lastly, respondent argues there was an overpayment of temporary total disability compensation.

Conversely, claimant requests the Board affirm the SALJ's Award in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a home health technician for respondent. Her job required that she go to the homes of elderly clients and provide personal assistance with their activities of daily living. Claimant would help with bathing, showering, grooming, preparation of meals and other household duties.

On June 27, 1996, after seeing a client, claimant was returning to her home office in Independence, Kansas. She was driving approximately 30 miles an hour on a county road when she hit loose gravel. Her car went into a ditch and up through a fence coming to rest in a field. Although claimant was wearing her seatbelt and shoulder belt she was thrown about in the vehicle during the accident and immediately experienced pain in her right hip.

Although the 1987 Oldsmobile that claimant was driving was "totaled" in the accident, she was able to drive the car back onto the road and to the home of a relative. She was then taken to the Mercy Hospital emergency room in Independence, Kansas. X-rays of the right hip and pelvis were negative. Claimant was referred to her personal physician for further treatment. She remained in bed over the weekend, and the following Monday went to see her personal physician, Dr. Geeta Sandhu. Claimant was diagnosed with a soft tissue injury, taken off work, and was prescribed pain medication and physical therapy. Because her condition did not improve with conservative treatment, Dr. Sandhu referred claimant to Dr. Erwin Howell for an orthopedic evaluation.

Dr. Howell ordered a bone scan and an EMG. Both were negative, and an MRI of the lumbar spine showed no significant abnormality. As a result, additional physical therapy was prescribed. The respondent then referred claimant for treatment with Dr. Kevin Komes. Claimant was examined by Dr. Komes on August 7, 1996, and another EMG was performed which was negative. Claimant continued with physical therapy, and on August 28, 1996, was released to return to her regular work activities. Although claimant was still using crutches, the doctor concluded that in the absence of physical or radiographic evidence claimant's disability was significantly out of proportion and he indicated secondary gain issues should be considered as motivating claimant.

Since claimant was still experiencing pain she asked the insurance carrier's nurse case manager what she should do and was told she had \$500 available for unauthorized medial care. Claimant decided to seek unauthorized medical treatment and returned to Dr. Howell who referred her to Dr. Ray Loffer. Dr. Loffer diagnosed claimant with a sciatic contusion and suggested further diagnostic studies.

Claimant then applied for a preliminary hearing seeking additional medical treatment. The ALJ ordered respondent to provide a list of three physicians from which claimant selected Dr. Philip Mills. Dr. Mills initially examined claimant on March 5, 1997. Claimant complained of severe right hip pain with numbness and tingling, and was ambulating with crutches. The doctor testified:

Q. (By Mr. Seeber) So would you continue, Doctor?

A. On physical examination, I found a white female with a stated height of five-foot three and stated weight of 130 pounds. She had dramatic transfers that I could not explain on a physiologic basis. She dragged the right foot in hysterical type gait problem, which was different walking forward than backward and which cannot be explained on an anatomic basis and that's fairly classic for hysterical pattern. There was drama with crying when attempting to bear weight. There were controlled semi-falls when [she] walked with me. There was tenderness to light touch. Sensation to light touch and pinprick was decreased in a non-physiologic pattern in the lower extremity. However, after electrical stimulation treatment the sensation was restored. Again, this is classic for hysterical findings. There were no neurologic objective abnormalities, including deep tendon reflexes, measurements of calf or thigh bilaterally. Manual muscle tests indicated give-way type weakness. I could not evaluate straight leg raising. It was different with distractive type maneuvers, however, she complained quit[e] bitterly with virtually any hip movement. She was able to ambulate following the electrical stimulation. Those are my findings.<sup>1</sup>

The doctor further defined the words "hysterical findings" in the following fashion:

Q. Doctor, when you say the words "hysterical findings," what do you mean by that?

A. Hysterical is nonvolitional, that is, it's not a person malingering, but it is non-physiologic and it's an abnormality in which a person has no physiologic problem but does have a psychologic problem, either in numbness, weakness or both.

Q. It is a very real condition to the person who is demonstrating the hysterical findings, true?

A. Yes.

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<sup>1</sup> Mills Depo. at 7-8.

Q. It is a psychological condition that has flowed from the injury, true?

A. Well, I don't know where it flows from, but it's certainly a psychological problem.

Q. But, again, the pain is real to the patient?

A. The person is not consciously attempting to deceive.<sup>2</sup>

Dr. Mills placed claimant in a pain management program which included physical therapy, aquatic therapy and educational programs to inform her on how to deal with pain. Claimant had used crutches to walk after the accident until her treatment with Dr. Mills. After treatment was concluded she was able to ambulate without assistive devices.

Dr. Mills discharged claimant with the suggestion that he would be happy to see her again if the need should arise. Dr. Mills testified that claimant never contacted him after she was released. The doctor released claimant to return to work with restrictions to avoid repetitive trunk pivot and rated her functional impairment at 5 percent to the body as a whole pursuant to the fourth edition of the *AMA Guides*.<sup>3</sup>

Claimant attempted to return to work upon her release from treatment with Dr. Mills. She went through orientation classes regarding using hand held computers to enter information and then returned to a job described as assistive standbys, assisting people in and out of the shower. Claimant testified that she attempted the job and it caused pain.

As previously noted, Dr. Mills told claimant to return if necessary and claimant said she called Dr. Mills' office about her condition when her pain gradually returned. Dr. Mills disputes that his office was contacted. Claimant agreed that when she contacted Dr. Mills' office regarding the return of her pain that she did not specifically request an appointment.<sup>4</sup>

As claimant's pain gradually returned she went back to Dr. Howell for additional treatment. When claimant returned to Dr. Howell she knew he was not the authorized physician. Claimant testified:

Q. Well, rather than go back over that any more I will just leave what's already in the record to let it speak for itself. Next let me go to Dr. Howell. Dr. Howell, going back to him, you knew he was unauthorized when you went back to him in 1997, didn't you?

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<sup>2</sup> *Id.* at 13-14.

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>4</sup> P.H. Trans. (Dec. 10, 1997) at 21.

A. Yes.<sup>5</sup>

When claimant returned to Dr. Howell on July 16, 1997, she still complained of pain and tenderness throughout the area of the right sciatic notch up to the lumbosacral junction as well as behind the greater trochanter. Additional EMG and nerve conduction studies were reported to be within normal limits and an MRI done July 28, 1997 showed no significant abnormality. Dr. Howell concluded claimant might benefit from a right piriformis muscle release from the posterior approach. On September 18, 1997, Dr. Howell operated on claimant's right hip releasing the piriformis muscle from its point of insertion as well as excising a protruding mass of bone from the posterior edge of the greater trochanter.

Although claimant noted some improvement in her condition, she continued to use a cane to ambulate. Due to her ongoing pain complaints the claimant was referred to Dr. Horton for pain management which consisted of anti-inflammatory medication as well as muscle relaxers, pain medication and prescriptions for a TENS unit and a lumbosacral back brace.

The ALJ then ordered Dr. Robert Rawcliffe to perform an independent medical examination of the claimant. Dr. Rawcliffe examined claimant on April 2, 1998, and after conducting a physical examination and review of claimant's medical records diagnosed claimant as having suffered a contusion of the right buttock and hip in the automobile accident. The doctor further diagnosed claimant as suffering from chronic pain syndrome. The doctor rated claimant with a 10 percent impairment to the right lower extremity and imposed restrictions against prolonged standing or walking. He indicated claimant should be limited to the light work category with occasional lifting of up to 20 pounds, more frequent lifting of up to 10 pounds and avoidance of bending and crouching.

Dr. Rawcliffe's report noted that ordinarily it would be expected for claimant to have fully recovered from her injuries. The report noted:

One would ordinarily anticipate full recovery from this type of infection [sic] and the patient's complaints were noted by numerous physicians who saw her to be out of proportion to any objective physical findings.

She has now undergone an operative procedure with a diagnosis of piriformis syndrome but although initially somewhat improved, her symptoms at present seem to be just as severe as prior to surgery. In retrospect, it would appear that the surgery was most probably ill advised and unnecessary.

It is my opinion that this patient is suffering from chronic pain syndrome. She exhibits all of the characteristics listed in the discussion of this condition contained in The Guides to Evaluation of Permanent Impairment published by the American

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<sup>5</sup> R.H. Trans. at 39.

Medical Association, 4th Edition. On page 308 and 309 there are eight characteristics of this condition including chronic pain of greater than six months duration; second a tendency to dramatization with verbal and nonverbal pain behavior; third a diagnostic dilemma with tendency to have extensive evaluations by multiple physicians without clear cut diagnoses being established; fourth there is a tendency to substance dependence and abuse; fifth the patients become dependent on their physicians and demand excessive medical care over a long period of time with no lasting benefit, they become dependent on their spouses and families; sixth depression is frequently present with psychological test results suggesting depression, hypochondriasis, and hysteria; seventh there is disuse with prolonged excessive immobilization resulting in secondary pain of musculoskeletal origin; eighth there is dysfunction with loss of adequate coping skills, withdrawal from normal social relationships and from work and recreational endeavors, etcetera. The patient's tend to become increasingly isolated and eventually restrict their activities to bare essentials of life.

This patient seems to display all eight of these characteristics and consequently it is my opinion that she is an example of chronic pain syndrome.<sup>6</sup>

Claimant has not looked for work since being released from treatment by Dr. Mills due to her ongoing pain complaints. Claimant applied for and received Social Security Disability benefits. She described her current condition as only being able to sleep two hours a night. She indicated that she then gets up and sits in a recliner and dozes on and off, then when she gets up in the morning she usually spends the day going back and forth from sitting in the recliner to lying down on the bed. Claimant does no housework or preparation of meals.

Claimant attempted a vocational rehabilitation program through Social Security, but because of her chronic pain was unable to sit through the class. She does not think that there is any job she is capable of performing.

At the request of her attorney, claimant met with Dan R. Zumalt, a vocational expert. Mr. Zumalt prepared a task list covering claimant's 15 year work history preceding the date of the accident. Mr. Zumalt opined that based upon the restrictions placed on claimant by Drs. Prostic and Rawcliffe, as well as claimant's educational background, claimant is permanently totally disabled from substantial gainful employment.<sup>7</sup>

Also, at the request of her attorney, claimant was examined by Dr. Edward J. Prostic on May 13, 2002. Dr. Prostic noticed claimant exhibited some signs of symptom magnification, but that it was for psychological reasons. The doctor explained:

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<sup>6</sup> R.H. Trans. (July 9, 2003), Ex. 1 at 9 (Dr. Rawcliffe's Apr. 2, 1998 report).

<sup>7</sup> Zumalt Depo. at 13-14.

Q. Doctor, you mentioned the term symptom magnification. Can you define that for the Administrative Law Judge?

A. There are a number of patients who report symptoms beyond that which we can find with objective testing. Each time it happens, we have to ask ourselves whether they have disease that we have not yet appreciated and whether that disease is organic or psychological, or whether the patients are just malingerers.

Q. In the case of Ms. Ballew Sullivan, was her symptom magnification organic in nature or was it a result of psychological impairment or was she a malingerer?

A. To the best of my knowledge, it was for psychological reasons.<sup>8</sup>

Dr. Prostin administered an MMPI to claimant and the test results indicated a high probability of psychological problems with symptom magnification. The doctor diagnosed claimant with an injury to her low back from which she developed a piriformis syndrome which required surgery, but her recovery is impeded by psychological factors. The doctor opined claimant suffered a 20 percent permanent partial whole person functional impairment as a result of her injury. Dr. Prostin adopted the restrictions imposed by Dr. Rawcliffe of occasional lifting up to 20 pounds, 10 pounds frequently, and avoidance of bending and crouching. Dr. Prostin utilized the task list prepared by Mr. Zumalt and opined claimant had lost the ability to perform 17 of 47 tasks for a 36 percent task loss. Nonetheless, Dr. Prostin opined that claimant is permanently and totally disabled from gainful employment as a result of her June 27, 1996 accident, unless she could be brought back to reasonable psychological health.

At the request of her attorney, claimant was seen by Richard Sweetland, PhD, a clinical psychologist, for a psychological evaluation. The doctor diagnosed claimant with depression as a direct result of her work-related injury. Dr. Sweetland rated claimant with a 35 percent impairment and concluded that she was not able to perform substantial gainful employment as a result of her psychological condition. The doctor testified:

Q. (By Mr. Phalen) Doctor, have you formulated an opinion as to whether or not Ms. Ballew can perform any substantial, gainful employment as a result of her psychological condition?

A. In my opinion she's not able to sustain productive employment at this time.

Q. Can you explain to the administrative law judge why not?

A. Yes. Number one, this lady is in constant physical pain. She walks with aid of a cane and has suffered physical disability from the time of her accident; second,

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<sup>8</sup> Prostin Depo. at 12.

her psychological state is one of discouragement and depression. Her social relationships are impaired and her general attitude is one of a depressive state.

Q. Doctor, have you formulated an opinion as to whether or not as a result of her psychological condition Ms. Ballew is permanently, totally, disabled from substantial gainful employment?

A. Yes.

Q. What is that opinion?

A. My opinion she's fully disabled psychologically in relationship to the pain which she suffers.<sup>9</sup>

Dr. Sweetland further opined that claimant's responses to the psychological tests that he administered indicated she was not exaggerating, faking or misrepresenting herself.

At the request of respondent's attorney, Theodore A. Moeller, a licensed psychologist, reviewed claimant's medical and psychological records, but did not interview claimant. Dr. Moeller then prepared a report and offered his opinions regarding claimant. Dr. Moeller opined that after reviewing the results of the psychological tests administered by Dr. Sweetland it was not possible to make a diagnosis of claimant's condition as provided by Dr. Sweetland, and that after reviewing the results of the psychological tests administered by Drs. Sweetland and Prostic it was not possible to rule out the probability that claimant was malingering. Although Dr. Moeller challenged the findings of Drs. Sweetland and Prostic, he did not offer an opinion regarding claimant's condition other than simply stating, that based upon the records he reviewed, it was not possible to make a diagnosis. Stated another way, Dr. Moeller did not offer an opinion that claimant was malingering, he instead stated that it had not been ruled out, nor did he offer any other opinion regarding claimant's psychological condition, if any.

At the request of respondent's attorney, Dr. Kevin D. Komes examined claimant on August 27, 2003. After reviewing claimant's medical records and examining claimant, Dr. Komes opined that claimant's well groomed physical appearance was inconsistent with someone complaining of unremitting chronic pain. Dr. Komes did not detect any atrophy in claimant's lower extremities. Although Dr. Komes agreed claimant fit the definition for chronic pain syndrome, he noted claimant also fit all the criteria for malingering. He concluded from a review of the records that claimant was suffering from preexisting diagnosed depression at the time of her accident. Dr. Komes concluded there was no physical basis for claimant's complaints, that claimant had preexisting psychiatric issues, secondary gain issues were not considered by the treating physicians and claimant has no permanent restrictions as a result of the automobile accident. Dr. Komes' report noted:

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<sup>9</sup> Sweetland Depo. at 10-11.



CONCLUSION: Ms. Sullivan had a motor vehicle accident in June 1996 during work activities. At no time has there been any positive radiographic or electrodiagnostic tests to explain her complaints. Her physical examination and alleged complaints are noted to be inconsistent and variable throughout the medical records. She has significant underlying psychiatric issues, which pre-date her alleged injury. Secondary gain issues, either from a financial or emotional aspect, have not been considered by any of the treating physicians. Based on her evaluation at this time and review of the medical records, it is felt that there is no physical basis for the patients' complaints. It is likely that she will continue to claim significant disability as a result of her work-related injury while she is obtaining secondary gain, whether it is financial or emotional. It is not felt that she sustained any significant physical impairment from her alleged injury. Based on the previous mental health record, it is noted that she had significant dysfunction in activities of daily living due to psychiatric illness prior to her alleged workers' compensation claim. It is not felt that she should have any permanent restrictions in regards to her activities as she has no medical basis for permanent restrictions related to her alleged work injuries.<sup>10</sup>

Dr. Vijaya Kanmanthreddy, a board certified psychiatrist and the medical director at the Four County Mental Health Center, treated claimant beginning in June of 1995. Dr. Kanmanthreddy diagnosed claimant as having major depression without psychosis and marijuana abuse. The doctor prescribed Zoloft and saw claimant on three additional occasions in August, September and November of 1995. At the last visit there were discussions regarding a different medication as well as blood testing, but claimant did not return to see Dr. Kanmanthreddy after that office visit.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>11</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>12</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>13</sup>

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<sup>10</sup> Komes Depo., Ex. 2 at 8.

<sup>11</sup> K.S.A. (Furse 1993) 44-501(a).

<sup>12</sup> K.S.A. 1995 Supp. 44-508(g).

<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

K.S.A. (Furse 1993) 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. (Furse 1993) 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>14</sup>

In *Wardlow*<sup>15</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Claimant detailed her inability to maintain a body position without constantly changing positions and that she is in constant pain. She notes that she is on Social Security Disability and as a result of her work-related injury is unable to work and has suffered a permanent total disability. The Board agrees.

The Board is not unmindful there is evidence that claimant's physical restrictions alone would not prevent her from returning to substantial and gainful employment, but, as noted by Dr. Prostic, claimant's perceived pain and psychological condition prevent her from engaging in physical activities and, in fact, claimant's pain worsens with increased physical activity. Dr. Prostic agreed with Dr. Rawcliffe's determination that claimant suffered from chronic pain syndrome. After treating claimant, Dr. Mills concluded that claimant was not malingering, that her pain was real to her, and that she was not consciously attempting to deceive. The court ordered independent examiner, Dr. Rawcliffe

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<sup>14</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>15</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

concluded claimant fit all the criteria and suffered from chronic pain syndrome. One of the criteria was depression, which was Dr. Sweetland's diagnosis of claimant.

Dr. Sweetland diagnosed claimant with depression and opined that she is realistically unemployable. The doctor related claimant's psychological condition to her work-related accident. Dr. Prostic agreed that claimant's psychological condition prevented her from engaging in substantial gainful employment and that this condition was caused by her work-related accident. Mr. Zumalt, the vocational expert also opined that claimant was unable to engage in substantial and gainful employment. During his treatment of claimant, Dr. Mills noted hysterical findings, but specifically concluded claimant was not consciously attempting to deceive. Upon review of all the circumstances surrounding claimant's condition, the Board adopts and affirms the SALJ's finding that claimant is permanently and totally disabled due to the combination of her physical injuries and psychological condition which was directly traceable to her physical injuries suffered in the work-related accident.

The Board is not unmindful that Dr. Komes clearly did not think claimant needed restrictions as a result of her work-related accident and strongly inferred that claimant's exhibited pain was for secondary gain. And Dr. Moeller disagreed that there was sufficient evidence to support a diagnosis that claimant had a psychological condition, but he never offered a specific opinion regarding claimant and instead simply challenged the other opinions provided in this case. Upon review of all the evidence, the Board finds the testimony provided by Drs. Sweetland and Prostic as supported by Drs. Mills and Rawcliffe is more persuasive than the testimony provided by Drs. Komes and Moeller.

The Workers Compensation Act compels a respondent to provide medical treatment that is reasonably intended to cure and relieve an injured employee of the effects of a compensable injury.<sup>16</sup> With that obligation comes the right to designate the authorized treating physician. Only when a respondent fails and/or refuses to provide medical treatment is a claimant permitted to select a physician to direct his or her care.<sup>17</sup>

As previously noted, the claimant agreed that when she sought treatment with Dr. Howell in July of 1997 she knew he was not authorized to provide medical treatment. Claimant further agreed that in her calls to Dr. Mills she never requested an appointment to return for additional treatment. Moreover, Dr. Mills denied that his office had been contacted by claimant after she was released from his treatment.

When claimant had earlier been released from treatment by Dr. Komes she obtained additional treatment by preliminary hearing wherein the ALJ ordered respondent

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<sup>16</sup> K.S.A. (Furse 1993) 44-510.

<sup>17</sup> *Id.*

to provide such treatment. However, after released by Dr. Mills, the claimant sought treatment, which she knew was not authorized. Moreover, claimant did not have a sudden change in her condition such that emergency surgery was required.

Claimant did not request another preliminary hearing after Dr. Mills released her from treatment and her pain returned. Nevertheless, she went ahead with the surgical procedure as recommended by Dr. Howell who was not authorized by either respondent or the ALJ. Consequently, the Board concludes that the surgery and post-surgery treatment provided by Dr. Howell was unauthorized medical treatment under the Workers Compensation Act.<sup>18</sup> The Board finds respondent and its insurance carrier did not refuse or neglect to provide claimant with medical treatment.

The Board further notes that Dr. Rawcliffe, with the advantage of hindsight, opined that Dr. Howell's surgery was not necessary. On the other hand, Dr. Prostic did not concur with that opinion. Claimant's decision to have the surgery was otherwise reasonable. The surgery was performed in an attempt to cure the effects of claimant's work-related injury. Thus, whether the surgery was authorized or unauthorized is not controlling and does not disqualify claimant's entitlement to disability benefits.

In summary, the Board affirms the SALJ's determination claimant is permanently and totally disabled as a result of her work-related accident. The Board modifies the SALJ's Award and finds the surgery and post-surgery treatment provided by Dr. Howell was unauthorized and respondent is only liable for payment up to the \$500 maximum for unauthorized medical treatment.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Special Administrative Law Judge Jeff K. Cooper dated June 28, 2004, is affirmed in part and modified in part.

The Board affirms the finding that claimant is entitled to compensation for a permanent and total disability. The Board modifies the Award to find the surgery and post-surgery treatment provided by Dr. Howell was unauthorized and respondent is only liable for payment up to \$500 for such unauthorized medical treatment.

**IT IS SO ORDERED.**

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<sup>18</sup> *Id.*

Dated this \_\_\_\_\_ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
John S. Seeber, Attorney for Respondent and its Insurance Carrier  
Jeff K. Cooper, Special Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director